

NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT
AND MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE
RULES. See Ariz. R. Supreme Court 111(c); ARCAP 28(c); Ariz. R. Crim. P. 31.24.

FILED BY CLERK

JUNE 27 2008

COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA,)	
)	
Respondent,)	2 CA-CR 2007-0337-PR
)	DEPARTMENT B
v.)	<u>MEMORANDUM DECISION</u>
)	Not for Publication
TOMAS SILVAS,)	Rule 111, Rules of
)	the Supreme Court
Petitioner.)	
)	

PETITION FOR REVIEW FROM THE SUPERIOR COURT OF COCHISE COUNTY

Cause No. CR90-00491

Honorable Wallace R. Hoggatt, Judge

REVIEW GRANTED; RELIEF DENIED

Tomas Silvas

Buckeye
In Propria Persona

E C K E R S T R O M, Presiding Judge.

¶1 Petitioner Tomas Silvas challenges the trial court's summary dismissal of his petition for post-conviction relief. We review the trial court's ruling for an abuse of discretion. *See State v. Watton*, 164 Ariz. 323, 325, 793 P.2d 80, 82 (1990). Although we grant review, we deny relief.

¶2 In 1990, while serving a sentence for a burglary conviction, Silvas kidnapped and assaulted a prison guard. Pursuant to a plea agreement, he pled guilty to kidnapping with intent to inflict serious physical injury, and he admitted his burglary conviction constituted a prior conviction for sentencing purposes. The plea agreement provided for an enhanced sentencing range of seven to twenty-one years. The trial court sentenced Silvas to the aggravated, twenty-one-year term. Silvas appealed, arguing the trial court had abused its discretion in imposing sentence. This court affirmed his conviction and sentence on appeal. *State v. Silvas*, No. 2 CA-CR 91-0420 (memorandum decision filed Aug. 25, 1992).

¶3 In November 2006, Silvas filed a pro se petition for post-conviction relief pursuant to Rule 32, Ariz. R. Crim. P., again challenging the validity of his sentence.¹ He argued that he had been entitled to a jury determination of aggravating factors under *Blakely v. Washington*, 542 U.S. 296 (2004), and that his trial counsel had been ineffective for failing to advise him of this right and assert it at sentencing. He also argued that, because his plea agreement had specifically identified as a prior conviction only the burglary conviction for which he had been imprisoned when he committed the kidnapping, the trial court had improperly considered the remainder of his criminal history in imposing an aggravated sentence.

¹Silvas's petition also included a challenge to the voluntariness of his guilty plea, but Silvas effectively abandoned that claim below. The trial court did not rule on the issue, and Silvas has not attempted to raise it on review.

¶4 The trial court appointed counsel for Silvas. But counsel filed a notice pursuant to Rule 32.4(c)(2), stating she had completed her review of the case and had found no claim for relief to raise on Silvas’s behalf and asking the court to allow Silvas time to file a petition for post-conviction relief in propria persona. Silvas filed a supplement to his petition for post-conviction relief, essentially reasserting the same sentencing claims he had raised in his original petition. He appears to assert the same arguments in his petition for review.² The court summarily denied relief finding the *Blakely* decision inapplicable to Silvas’s case and finding his remaining arguments precluded because they either were, or could have been, raised on appeal.³ We find no abuse of discretion.

¶5 *Blakely* is not retroactive and only applies to convictions not yet final at the time it was decided. *State v. Febles*, 210 Ariz. 589, ¶ 7, n.4, 115 P.3d 629, 632, 632 n.4 (App. 2005). A conviction is final when ““the availability of appeal [is] exhausted, and the time for a petition for certiorari elapsed or a petition for certiorari finally denied.”” *Id.*

²We note that Silvas also asserts that his “post-conviction counsel was ineffective” for failing to raise the issues discussed herein in the post-conviction proceedings. But Silvas may not raise issues in a petition for review that were not decided by the trial court. *See* Ariz. R. Crim. P. 32.9(c)(1)(ii). Moreover, there is no federal constitutional right to effective assistance of counsel in post-conviction relief proceedings. *See State v. Armstrong*, 176 Ariz. 470, 474-75, 862 P.2d 230, 234-35 (App. 1993). Therefore, we do not address this contention. Likewise, to the extent Silvas contends trial counsel was ineffective for failing to raise issues other than those pertaining to *Blakely*, he failed to raise this argument below, and we do not consider it here.

³The trial court also found Silvas’s petition for post-conviction relief untimely. We note, however, that Silvas was convicted and sentenced before the time limits contained in Rule 32.4(a) became effective; therefore, they do not apply to him. *See* 171 Ariz. XLIV (1992); *Moreno v. Gonzalez*, 192 Ariz. 131, ¶ 22, 962 P.2d 205, 209 (1998).

¶ 9, quoting *State v. Towery*, 204 Ariz. 386, ¶ 8, 64 P.3d 828, 832 (2003), quoting *Griffith v. Kentucky*, 479 U.S. 314, 321 n.6 (1987). Silvas’s conviction became final years before *Blakely* was decided. Therefore, it is inapplicable to Silvas’s case, and his counsel was not ineffective for failing to raise the issue. See *Strickland v. Washington*, 466 U.S. 668, 687 (1984) (to establish claim of ineffective assistance of counsel, defendant must show counsel’s performance was deficient and prejudicial); *State v. Nash*, 143 Ariz. 392, 397, 694 P.2d 222, 227 (1985) (same).

¶ 6 Pursuant to Rule 32.2(a)(1) and (2), a defendant is precluded from raising in a post-conviction proceeding claims that were either “[r]aisable on direct appeal” or “[f]inally adjudicated on the merits on appeal.” None of the exceptions listed in Rule 32.2(b) apply to Silvas’s claim that the court improperly considered his criminal history at sentencing, in contravention of his plea agreement. His non-*Blakely*-based arguments were all raisable on appeal. Therefore, the trial court correctly found them precluded.

¶ 7 Although we grant review, we deny relief.

PETER J. ECKERSTROM, Presiding Judge

CONCURRING:

PHILIP G. ESPINOSA, Judge

GARYE L. VÁSQUEZ, Judge